

FILE COPY

No. 70-295

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E. ROBERT SEAGER, CL

In the Supreme Court of the United States
OCTOBER TERM, 1971

FIRST NATIONAL CITY BANK, PETITIONER

v.

BANCO NACIONAL DE CUBA

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE**

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This case involves a claim by Banco Nacional de Cuba for excess collateral it had pledged with petitioner to secure a loan, and a counterclaim by petitioner for that excess—conceded to be at least two million dollars—as an offset against the value of petitioner's property in Cuba expropriated by Cuba without compensation. After considering the view of the Department of State that such counterclaims should be permitted in the furtherance of our foreign policy interests,¹ the court of appeals (Judge Hays

¹ On November 17, 1970, we provided the Court with a letter setting forth the views of the Department of State that important considerations of foreign policy should preclude appli-

dissenting) held that the act of state doctrine barred the counterclaim.

The relevant facts and the procedural history of the case are set forth in the two opinions of the court of appeals and the opinion of the district court which are appended to the petition (Pet. Apps. A, D and E).

1. In the opinion of the United States, the court of appeals' decision seriously impairs the power of the Executive over the control of foreign affairs both by rejecting the considered judgment of the Department of State that the act of state doctrine should not govern this case² and by narrowly limiting the *Bernstein* exception to that doctrine (*Bernstein v. N. V. Nederlandsche-Amerikaansche, etc.*, 210 F. 2d 375, 376 (C.A. 2) (see Pet. App. A5-A9)).

In its letter to this Court the Department of State has stated its views in this case in clear terms. It noted the great increase in expropriations over the last decade and the Department's concern with the high vulnerability of certain American firms, es-

cation of the act of state doctrine to cases like the instant one. See Memorandum submitted by the Solicitor General in *First National City Bank v. Banco Nacional De Cuba*, No. 846, O.T., 1970. On January 25, 1971, the Court granted certiorari, vacated the judgment and remanded the case to the court of appeals "for reconsideration in light of the views of the Department of State" as set forth in that letter. 400 U.S. 1019. The letter is appended to the petition (Pet. App. C).

² The act of state doctrine is an exception to the basic principle that United States courts adjudicate cases and controversies including those involving the application of international law "as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700.

pecially financial institutions, to suits by expropriating foreign governments as plaintiffs (Pet. App. C5). And it concluded "that the foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances" (Pet. App. C6). By disregarding this statement of Executive policy involving foreign investment by American firms, the court below has seriously restricted the capacity of the government to assist American investors in securing prompt, adequate and effective compensation for expropriation of American property abroad.

2. Nothing decided in *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, requires such an unyielding application of the act of state doctrine. The Court in *Sabbatino* made clear that it was not "laying down or reaffirming an inflexible and all-encompassing rule * * *." 376 U.S. at 428. Nor did the Court in *Sabbatino* have occasion to pass upon the validity or breadth of the *Bernstein* exception (*id.* at 436). As the Court noted, the Department of State had expressed no views as to the applicability of the act of state doctrine in that case. 376 U.S. at 420. See Brief for the United States in No. 16, O.T., 1963, p. 11. *Sabbatino* accordingly provides no authority for the narrow scope given the *Bernstein* exception by the court below and is in no way dispositive of this case. In contrast to *Sabbatino*, the Department here has made clear its view that application of the act of state doctrine would be inimical to significant foreign policy interests. This considered judgment of the Ex-

ecutive Department charged with responsibility in the field of foreign affairs should be heeded by the courts.

3. Moreover, the considerations of fairness which underly the decision in *National City Bank v. Republic of China*, 348 U.S. 356, are relevant to this case as well. In *Republic of China*, the Court held that a foreign sovereign suing in a federal court waives its immunity as regards counterclaims brought by the defendant. The Court pointed out that in such circumstances the foreign sovereign "wants our law, like any other litigant, but it wants our law free from the claims of justice" (348 U.S. at 361-362); it concluded that in such a setting "fair dealing" outweighs the traditional rule of sovereign immunity (*id.* at 365). So here, an instrumentality of the expropriating foreign sovereign³ should not be permitted to institute a suit and be immune from setoffs and counterclaims up to the amount of the original claim which could be brought against it were the sovereign an ordinary plaintiff.

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

³ As the district court pointed out, there "is no serious question that the Government of Cuba and Banco Nacional are one and the same for purposes of this litigation" (Pet. App. E4).

